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# PARENTAL CHOICE, CATHOLIC SCHOOLS, AND EDUCATIONAL PLURALISM AT THE DAWN OF A NEW ERA IN K-12 EDUCATION REFORM

JOHN SCHOENIG\*

*This Article examines the curious intersection between the dramatic expansion of publicly funded private school “parental choice” programs (i.e. voucher, scholarship tax credit, and education savings accounts) and the continued shrinkage of the Catholic school sector in recent years. As questions of educational equality and parental rights have come to dominate the conversation about the preferred aims of education reform, parental choice seems to be gaining traction as a policy measure that empowers at-risk families and improves the educational landscape. There is perhaps no dimension of the private school community with more to gain from this movement than the K-12 Catholic school system, which remains the largest private school system in the United States. More than twenty years after the passage of the nation’s first parental choice program, we see that Catholic schools have indeed taken advantage of such opportunities to varying degrees. Recent estimates indicate that there are approximately 460,000 “empty seats” in Catholic schools nationwide. Perhaps more striking is the fact that more than one third of these empty seats are found in states that already have at least one parental choice program. This Article outlines the intellectual and legal foundations of the parental choice movement and the current state of play for Catholic school participation in such initiatives.*

## INTRODUCTION

In April 2008, Pope Benedict XVI traveled to the United States for a historic 5-day Apostolic Visit.<sup>1</sup> The trip was notable for many reasons: it was Pope Benedict’s first visit to the United

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1. Sewell Chan, *Candles, Clergy, and Communion for 57,000*, N.Y. TIMES, Apr. 12, 2008, at A1.

States since his election to the papacy in 2005;<sup>2</sup> President George W. Bush and First Lady Laura Bush broke with the custom of awaiting foreign dignitaries at the White House and greeted the Pope upon his arrival at the airport;<sup>3</sup> the Pope even celebrated his eighty-first birthday on the South Lawn, getting treated to two rounds of “Happy Birthday” and a twenty-one gun salute.<sup>4</sup>

For those interested in the American Catholic school system, one episode was particularly remarkable. On the third day of his visit, Pope Benedict XVI addressed an audience of his brother bishops, academics, and Catholic schoolteachers in the Conference Hall of the Catholic University of America.<sup>5</sup> The lecture touched on a wide variety of issues related to the American Church’s educational apostolate, from the intersection of academic freedom and Church teaching at the university level to the importance of Catholic schools in promoting human dignity.<sup>6</sup> At one point, the Pope reflected on the unique contributions that K–12 Catholic schools have made to American civic society, as well as to what he understood to be an implicit state duty to enable the right of parents to choose an education in the faith.

The Catholic community here has in fact made education one of its highest priorities. This undertaking has not come without great sacrifice. Towering figures like Saint Elizabeth Ann Seton and other founders, with great tenacity and foresight, laid the foundations of what is today a remarkable network of parochial schools contributing to the spiritual well-being of the Church and the nation. Some, like Saint Katharine Drexel, devoted their lives to educating those whom others had neglected—in her case, African Americans and Native Americans.<sup>7</sup> Countless dedicated Religious Sisters, Brothers, and Priests together with selfless parents have, through Catholic schools, helped

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2. Laurie Goodstein, *In U.S., A Pained and Uncertain Church Awaits the Pope*, N.Y. TIMES, Apr. 14, 2008, at A1.

3. Editorial, *Pope Benedict XVI Comes to America*, N.Y. TIMES, Apr. 15, 2008, available at <http://www.nytimes.com/2008/04/15/opinion/15iht-edpope.1.12004218.html>.

4. Laurie Goodstein & Sheryl Gay Stolberg, *Pope Praises Americans’ Faith and Warns of Perils of Secularism*, N.Y. TIMES, Apr. 17, 2008, at A22.

5. Neela Banerjee, *At University Visited by Pope, Students Find a Catholicism That’s ‘Not in Your Face,’* N.Y. TIMES, Apr. 18, 2008, at A18.

6. See POPE BENEDICT XVI, *Address of His Holiness Benedict XVI to Catholic Educators*, in CHRIST OUR HOPE: THE PAPAL ADDRESSES OF THE APOSTOLIC VISIT TO THE UNITED STATES 43 (2008).

7. See LOU BALDWIN, SAINT KATHARINE DREXEL: APOSTLE TO THE OPPRESSED 214 (2000).

generations of immigrants rise from poverty and take their place in mainstream society.

This sacrifice continues today. These schools are an outstanding apostolate of hope, seeking to address the material, intellectual and spiritual needs of over three million children and students. They also provide an opportunity for the entire Catholic community to contribute generously to the financial needs of our institutions. Their long-term sustainability must be assured. Indeed, everything possible must be done, in cooperation with the wider community, to ensure that they are accessible to people of all social and economic strata. No child should be denied his or her right to an education in faith, which in turn nurtures the soul of a nation.<sup>8</sup>

In many ways, the statement—“no child should be denied his or her right to an education in faith, which in turn nurtures the soul of a nation”—evokes a challenge put forth nearly twenty years prior to the Pope’s visit by an eclectic group of free market conservatives, inner-city parents, and elected officials. This challenge ultimately led to the creation of our first publicly funded “parental choice” program.<sup>9</sup> In 1990, a group of conservatively

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8. Pope Benedict XVI, *supra* note 6, at 44–45.

9. In the context of K–12 education, “parental choice” is a broad term. As a matter of education policy, it can refer to any local, state, or federal legislation or policy that enables families to have access to K–12 schools other than the traditional public school to which their children are assigned by virtue of their residence. Such a definition does not include what is arguably the most common form of parental choice: what Henry Levin refers to as “Residential Mobility Choice.” See Henry R. Levin, *An Economic Perspective on School Choice*, in *HANDBOOK OF RESEARCH ON SCHOOL CHOICE* 19, 24 (Mark Berends et al. eds., 2009). This is not a policy or program, but rather it is what happens when parents decide where to live based on the quality of public schools in a neighborhood. *Id.* As Ryan and Heise have argued, formal school choice programs essentially come in four varieties: intradistrict choice, interdistrict choice, charter plans, and voucher plans. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *YALE L.J.* 2043, 2063–85 (2002). Such a definition leaves aside magnet schools and homeschooling, which many—including Levin—would include on the choice spectrum. The first of these four varieties, intradistrict choice, allows families to enroll their children in the public school of their determination—as long as it is *within* their local school district. The second—intradistrict choice—is similar, but less common and more complex, as it expands a family’s educational options to schools in other districts. Next on this list are charter schools. Forty-two states and the District of Columbia now have charter school laws. THE CENTER FOR EDUCATION REFORM, *CHARTER SCHOOL LAWS ACROSS THE STATES 2012*, at 86 (Alison Consoletti ed., 13th ed. 2012), available at <http://www.edreform.com/2012/11/charter-school-laws-across-the-states-2012/>. Finally, there are those laws that provide public funding that enables families to enroll their children in nonpublic (including secta-

oriented Wisconsin policy makers found themselves united with a growing coalition of progressive parents and Milwaukee Mayor John Norquist on a radical education reform agenda.<sup>10</sup> The result of this alliance was the Milwaukee Parental Choice Program (MPCP), the United States' first publicly funded private school scholarship ("voucher") program for K–12 students.<sup>11</sup>

Nearly twenty-five years after the enactment of the MPCP, we are now in the midst of the most robust period of growth in the history of the parental choice movement.<sup>12</sup> There are now more than thirty parental choice programs in sixteen states.<sup>13</sup> In the 2011–12 school year, these programs provided more than 210,000 children nationwide with access to the education of their choosing, and that number increased to 245,000 in the 2012–2013 school year.<sup>14</sup> After a relatively slow start—Milwaukee stood alone in the parental choice world until 1995, when Ohio passed its own voucher program<sup>15</sup>—we have seen at least one new state enact its own school choice program each year since 2003.<sup>16</sup> Enrollment in school choice programs (now at approximately 245,000 nationwide) has nearly doubled since 2005, and the total amount of public (state and federal) funding for such programs is now estimated at \$963 million annually.<sup>17</sup>

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rian) schools. These programs are the smallest and most controversial in the broader world of parental choice. This Article will focus on this last form—that is, those programs that provide public funding to enable families to enroll their children in the school they determine is best for their children, including private sectarian schools. The terms “parental choice” and “school choice” are often used interchangeably. I have chosen to use the term “parental choice” here, as I believe that it is more helpful to focus on the figurative *subject* of the choice (i.e. the parent) rather than the *object* (i.e. the school).

10. Joseph P. Viteritti, *Voucher Politics and Governance*, in *HANDBOOK OF RESEARCH ON SCHOOL CHOICE* 267, 273 (Mark Berends et al. eds., 2009).

11. *Id.*

12. MALCOM GLENN ET AL., *ALLIANCE FOR SCH. CHOICE, SCHOOL CHOICE NOW: THE YEAR OF SCHOOL CHOICE, SCHOOL CHOICE YEARBOOK 2011–2012*, at 6 (2012), available at [http://s3.amazonaws.com/assets.allianceforschoolchoice.com/admin\\_assets/uploads/67/scy2012.pdf](http://s3.amazonaws.com/assets.allianceforschoolchoice.com/admin_assets/uploads/67/scy2012.pdf) [hereinafter *SCHOOL CHOICE YEARBOOK 2011–2012*].

13. MALCOM GLENN ET AL., *ALLIANCE FOR SCH. CHOICE, SCHOOL CHOICE NOW: THE POWER OF EDUCATIONAL CHOICE, SCHOOL CHOICE YEARBOOK 2012–2013*, at 6 (2013), available at [http://s3.amazonaws.com/assets.allianceforschoolchoice.com/admin\\_assets/uploads/167/School%20Choice%20Yearbook%202012-13.pdf](http://s3.amazonaws.com/assets.allianceforschoolchoice.com/admin_assets/uploads/167/School%20Choice%20Yearbook%202012-13.pdf) [hereinafter *SCHOOL CHOICE YEARBOOK 2012–2013*].

14. *SCHOOL CHOICE YEARBOOK 2011–2012*, *supra* note 12; *SCHOOL CHOICE YEARBOOK 2012–2013*, *supra* note 13, at 14.

15. TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* 37–38 (2001).

16. See *SCHOOL CHOICE YEARBOOK 2012–2013*, *supra* note 13, at 14.

17. *Id.* at 11.

As a matter of education policy, parental choice is expanding. There are now more parental choice programs and more *kinds* of parental choice programs—including vouchers, scholarship tax credits, tuition tax credits, and education savings accounts—than ever before.<sup>18</sup> As gains are made on the *policy* front, the challenges and opportunities on the *implementation* front will inevitably emerge—specifically, how can parents, schools, and school systems respond to parental choice once it has become available. This Article will examine the unique dimensions of implementing school choice through the lens of the K–12 Catholic school system. Despite the fact that Catholic schools have lost more than 600,000 children since 2000,<sup>19</sup> the United States Catholic school system is still the largest private school system in the nation.<sup>20</sup> This fact, coupled with the two core tenets of Catholic social thought, that parents are the primary educators of their children<sup>21</sup> and that there is a fundamental parental right to determine the best education for one's children,<sup>22</sup> might suggest that Catholic schools would be among the most assiduous participants in school choice programs. In reality, Catholic schools have had varying degrees of success regarding the extent of their participation in parental choice programs.

It is my hope that this Article will contribute in some small way to the ongoing dialogue in the American Catholic Church and the education reform community about what role publicly funded parental choice should play in empowering parents with the ability to enroll their children in a Catholic school. I am particularly interested in helping academics, policy makers, and educators re-frame this conversation about parental choice and Catholic schools, which is among the most contentious in the

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18. *Id.* at 14.

19. See DALE McDONALD, NAT'L CATHOLIC EDUC. ASS'N, UNITED STATES CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS 1990–2000: THE ANNUAL STATISTICAL REPORT ON SCHOOLS, ENROLLMENT, AND STAFFING 11 (2000); DALE McDONALD & MARGARET M. SCHULTZ, NAT'L CATHOLIC EDUC. ASS'N, UNITED STATES CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS 2011–2012: THE ANNUAL STATISTICAL REPORT ON SCHOOLS, ENROLLMENT, AND STAFFING 2 (2012).

20. See STEPHEN BROUGHMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, PRIVATE SCHOOL UNIVERSE SURVEY (PSS): SURVEY DOCUMENTATION FOR SCHOOL YEAR 2009–10, at 26 (2012), available at <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=2012323>.

21. See PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 240, at 109 (2004) (“Parents are the first educators, not the only educators, of their children. It belongs to them, therefore, to exercise with responsibility their educational activity in close and vigilant cooperation with civil and ecclesial agencies.”).

22. CATECHISM OF THE CATHOLIC CHURCH ¶ 2229 (2d ed. 2000).

education reform movement, in terms reflective of the sentiment expressed by Pope Benedict XVI. That is, how should we address questions regarding the idea of a fundamental right to an education in the faith, as well as the degree to which the state—by enabling this right—can indeed nurture the soul of our nation.<sup>23</sup>

This Article proceeds in three parts. Part I provides an overview of the “narrative” of the parental choice movement: from its intellectual origins in free enterprise, social justice, and equal educational opportunity, to its growth as a matter of policy from a single program to its current state,<sup>24</sup> to the themes and questions that will likely dominate the immediate future. Part II looks at marginal capacity in Catholic schools and Catholic school participation in parental choice programs throughout the country and provides a brief analysis of contexts in which Catholic school systems appear to be most successful at taking advantage of available public funding. Part III discusses the importance of these findings to debates about the expansion of parental choice programs and the revitalization of K–12 Catholic schools.

## I. PARENTAL CHOICE ON THE MOVE

### A. *From the Streets to the Academy*

#### 1. The Dagger Makes a Stand

Historians often trace the birth of the American parental choice movement to a 1955 article titled *The Role of Government in Education*, in which a young University of Chicago economist named Milton Friedman advocated for the adoption of a market

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23. For more on how questions of parental choice are situated in the modern education reform debate, see DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE UNDERMINE EDUCATION* 113–47 (2010), which describes the evolution of the idea of choice and the potential pitfalls. See also JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* 217–19 (1990) (making a case for the systemic competitive effects of parental choice); PETER W. CROOKSON, JR., *SCHOOL CHOICE* 17–37, 64–66 (1994) (framing the positions traditionally held by advocates and opponents of parental choice); Mark Berends et al., *School Choice Debates, Research, and Context*, in *SCHOOL CHOICE AND SCHOOL IMPROVEMENT* 3 (Mark Berends et al. eds., 2011); James S. Liebman, *Voice, Not Choice*, 101 *YALE L.J.* 259, 277–93 (1991) (reviewing JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (1990)) (arguing that parental choice may threaten traditional public education).

24. See *SCHOOL CHOICE YEARBOOK 2011–2012*, *supra* note 12, at 11–14 for tables and graphs depicting the current state of parental choice programs in the United States.

model in K–12 schooling.<sup>25</sup> Some would argue, however, that the first ideological battles over the intersection of state and school with regards to public funding for parental choice actually predate Dr. Friedman’s article by more than a century, when the first round of the famed New York City “School Wars” was fought.<sup>26</sup> For the better part of the eighteenth and nineteenth centuries, it had been quite common for public funds to be allocated to religious schools that would be recognized today as “private.”<sup>27</sup> These arrangements came into disfavor throughout the latter half of the nineteenth century when authors such as Horace Mann and political leadership such as the “Know-Nothing” Party asserted that the “Catholic menace,” comprised largely of recently arrived immigrants, presented a growing threat to the nation.<sup>28</sup>

Church leaders such as New York Archbishop John “Dagger” Hughes fought vehemently throughout the latter half of the nineteenth century to defend Catholic schools from the growing sentiment that public funds could not be allowed to support Catholic school students, even though it was perfectly acceptable to use such funds to support children in the Protestant dominated public schools.<sup>29</sup> For Hughes, this represented a denial of

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25. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955), reprinted in *MILTON FRIEDMAN, CAPITALISM AND FREEDOM* 85 (1982).

26. See DIANE RAVITCH, *THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS* 6–11, 33–76 (1974).

27. See CHARLES L. GLENN, *THE AMERICAN MODEL OF STATE AND SCHOOL* 158 (2012).

28. *Id.* at 158, 165.

29. RAVITCH, *supra* note 26, at 33–67; see also JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 19–42 (2003). As Ravitch points out, the ideological battle over state support of Catholic school students was initially sparked after New York Governor William H. Seward gave an address in January 1840 that Catholics interpreted as support for the proposition that Catholic schools were entitled to their share of support of public funds. RAVITCH, *supra* note 26, at 40. The proposal in part stated:

The children of foreigners, found in great numbers in our populous cities and towns, and in the vicinity of our public works, are too often deprived of the advantages of our system of public education, in consequence of prejudice arising from differences of language or religion. It ought never to be forgotten that the public welfare is as deeply concerned in their education as in that of our own children. I do not hesitate, therefore, to recommend the establishment of schools in which they may be instructed by teachers speaking the same language with themselves professing the same faith.

WM. OLAND BOURNE, *HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK* 179 (1870) (quoting William H. Seward, Governor of New York, Annual Message of Governor Seward (1840)). In response to this statement,



parental rights and an affront to religious liberty.<sup>30</sup> In 1840, Hughes and his followers issued a report on the growing opposition from the Public School Society that stated:

We are Americans and American citizens. If some of us are foreigners, it is only by the accident of birth. As citizens, our ambition is to be Americans; and if we cannot be so by birth, we are so by choice and preference . . . We hold, therefore, the same ideas of our rights that you hold of yours. We wish not to dominate yours, but only to secure and enjoy our own. Neither have we the slightest suspicion that you would wish us to be deprived of any privilege which you claim for yourselves.<sup>31</sup>

In the years to come, this conflict that had begun in the immigrant Catholic school communities of New York and Philadelphia very nearly resulted in a federal constitutional amendment that would have forbidden any direct or indirect public aid “of any religious sect or denomination.”<sup>32</sup> When the effort to amend the United States Constitution failed, the battle moved to the states. Thirty-three states ultimately incorporated similar provisions (often referred to as “Blaine Amendments”) into their own constitutions—some voluntarily, some as a condition of their admission to the union.<sup>33</sup> It is far beyond the scope of this Article to provide an exhaustive account of the form and function of these provisions, the origins of this broader debate regarding state aid to religious institutions, or the role of Blaine Amendments in the parental choice movement. Such efforts have been undertaken exceptionally well in various contexts by others.<sup>34</sup> For our purpose here, it should suffice to say that these

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one of Archbishop Hughes’ vicars general, a man named Dr. John Power, submitted a petition on February 25 to the City’s Board of Assistant Alderman to request that Catholic schools receive public aid based on need. The petition was not well received. In short order, the press, and the Public School Society and other religious denominations condemned it. See RAVITCH, *supra* note 26, at 40–41.

30. RAVITCH, *supra* note 26, at 40, 42.

31. BOURNE, *supra* note 29, at 331, 338.

32. See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 191–335 (2002); GLENN, *supra* note 27, at 168.

33. See generally Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657 (1998); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000).

34. See Viteritti, *supra* note 33; see also Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMENDMENT L. REV. 45 (2003); Steven K. Green, *The Blaine Amendments Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social*

nineteenth-century debates over the right to an education in faith can rightly be understood as the foundation of the modern parental choice movement.

## 2. Milton Friedman and the Case for an Education Marketplace

More than a century after Archbishop Hughes battled New York's Public School Society, Milton Friedman took a more docile—but no less provocative—approach in his seminal 1955 article.<sup>35</sup> Friedman argued that a publicly financed system of universal vouchers would foster the development of a diverse education marketplace, in which competition among schools would improve the overall quality of educational services.<sup>36</sup> For Friedman, a fundamental benefit of such a system was that it enabled economic and educational *freedom*.<sup>37</sup> As Joseph P. Viteritti has argued, Friedman's model was based on three propositions, namely that in a system of universal parental choice: (1) nonpublic schools would outperform public schools; (2) competition would force public schools to improve; and (3) a more diversified education marketplace would improve student achievement.<sup>38</sup> This market model came to dominate the intellectual debate regarding parental choice for several years.<sup>39</sup>

## 3. Parental Choice and Family Authority

The next important inflection point in the intellectual history of the parental choice movement came at the hands of John Coons and Stephen Sugarman, two Berkeley law professors who launched an ambitious attempt to reform California's school

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*Justice*, 4 TEX. REV. L. & POL. 301 (2000); Richard D. Komer, *School Choice and State Constitutions*, 3 J. SCH. CHOICE 331 (2009).

35. See Friedman, *supra* note 25.

36. *Id.*

37. Viteritti, *supra* note 10, at 268.

38. *Id.* at 268–69.

39. *Id.* at 268. This is not to say that the market model was the *only* approach to the question of publicly funded private school choice, or that the issue was confined to traditionally “conservative” academic circles. In 1968, TheodoreSizer, the Dean of Harvard's Graduate School of Education—who had been historically associated with more progressive issues—designed a voucher plan to provide educational options to low-income families. In contrast to Friedman's universalist approach, however, Sizer's plan was means tested to serve only economically disadvantaged children. See JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 55 (1999); see also Theodore R. Sizer & Phillip Whitten, *A Proposal for a Poor Children's Bill of Rights*, PSYCHOL. TODAY, Aug. 1968, at 59; Theodore R. Sizer, *The Case for a Free Market*, SATURDAY REV., Jan. 11, 1969, at 34.

funding regime in the early 1970s.<sup>40</sup> Coons and Sugarman argued that the correlation between the private wealth represented in a given area and the funding levels of the local public schools resulted in extraordinary and unconstitutional educational inequalities between low-income children and their more affluent peers.<sup>41</sup> These arguments and their empirical foundations were the benchmark for the seminal *Serrano* litigation, which helped ignite a national campaign for school finance reform that ultimately spread to more than forty states throughout the country.<sup>42</sup> Although the notion of publicly funded private school choice was not suggested in their initial publication, they ultimately endorsed the idea in a 1971 law review article and 1978 book, arguing that the expenditure of public funds to allow children to attend nonpublic schools could serve as a meaningful remedy to the educational inequalities they had identified.<sup>43</sup>

Their position, grounded in fundamental questions of poverty and inequality, won the support of progressive academics and advanced the argument for parental choice into new intellectual orbits.<sup>44</sup> What was striking about Coon and Sugarman's position, particularly in contrast to Friedman's, was that it was framed around issues of *parental rights* and *family authority*, rather than economic growth and market efficiency.<sup>45</sup> Instead of focusing on the education sector as a marketplace, Coons and Sugarman focused on the role that educational choice played in empowering families, and thereby in the cultivation of civil society. As Viteritti notes, Coons and Sugarman "appreciated that schools teach values, and that values taught in public schools are

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40. Viteritti, *supra* note 10, at 270; see also JOHN E. COONS ET AL., *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

41. Viteritti, *supra* note 10, at 270.

42. See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Serrano v. Priest*, 226 Cal. Rptr. 584 (Ct. App. 1986).

43. Viteritti, *supra* note 10, at 270; see John E. Coons & Stephen D. Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CAL. L. REV. 321, 324 (1971); JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 153-66 (1978).

44. Viteritti, *supra* note 10, at 270.

45. John E. Coons, *School Choice as Simple Justice*, FIRST THINGS, Apr. 1992, at 15. In the opening paragraph of this thought-provoking piece, Coons puts this position succinctly:

Shifting educational authority from government to parents is a policy that rests upon basic beliefs about the dignity of the person, the rights of children, and the sanctity of the family; it is a shift that also promises a harvest of social trust as the experience of responsibility is extended to all income classes. So far, that part of the message is not making it in the current great debate about schooling.

*Id.*

not necessarily consistent with those of any particular family.”<sup>46</sup> For them, a core benefit of choice was that it allowed poor families to reflect their own values, in addition to leveling the playing field—to some degree—with regard to the overall availability of educational options.<sup>47</sup>

#### 4. James Coleman and the “Catholic School Effect”

In the years following Friedman’s work and Coons and Sugarman’s contributions, the parental choice question continued to move in fits and starts throughout the mainstream academic community. In 1970, Christopher Jenks developed a provocative proposal for an extensively regulated voucher program as part of his work with the Federal Office of Economic Opportunity (OEO).<sup>48</sup> Jenks had been a responder to James Coleman’s seminal 1966 report on educational opportunities.<sup>49</sup> One of the major conclusions of Coleman’s highly controversial study, then the largest social science survey in United States history, was that the measured characteristics of school inputs have a minimal effect on student achievement—often dubbed as the “schools don’t matter” thesis.<sup>50</sup> In 1975, Coleman published another study, in which he made an argument that desegregation efforts such as busing had been a causal factor in the decline in white enrollment in public schools, which thereby actually increased racial separation in public education.<sup>51</sup>

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46. Viteritti, *supra* note 10, at 270.

47. *Id.*; see also Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847 (1999).

48. See CHRISTOPHER JENKS, *EDUCATION VOUCHERS: A REPORT ON FINANCING EDUCATION BY PAYMENTS TO PARENTS* (1970). As Henig notes, Jenk’s proposal differed from Friedman’s in several important ways, including the insistence on comprehensive regulation:

[t]he theoretical and practical distinctions between a voucher plan that explicitly acknowledges the need for strong, authoritative, and ongoing government oversight and responsibility and one—like Friedman’s—anchored in a theory that disparages the capacity of government to act wisely or in the public interest are much sharper and much more consequential than contemporary debate reflects.

JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE LIMITS OF THE MARKET METAPHOR* 234 (1995).

49. See VITERITTI, *supra* note 39, at 55.

50. *Id.* at 27; Viteritti, *supra* note 10, at 269; see also JAMES S. COLEMAN, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL & SOC. RESEARCH, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

51. VITERITTI, *supra* note 39, at 30; see also JAMES S. COLEMAN ET. AL., URBAN INST., *TRENDS IN SCHOOL SEGREGATION 1968–73* (1975).

This was followed by a 1982 analysis of American public, private, and parochial high schools.<sup>52</sup> Here, Coleman found that private schools tended to produce better academic outcomes, even after controlling for relevant factors, and that Catholic schools had “an unusual capacity to reduce the performance gap between White and Black boys.”<sup>53</sup> This second finding, which has come to be known as the “Catholic school effect,” was ultimately examined more extensively by Bryk, Lee, and Holland, in *Catholic Schools and the Common Good*.<sup>54</sup> It was this research that led Coleman to endorse the concept of publicly funded scholarships (either in the form of vouchers or tax credits) for children to attend the private school of their choice.<sup>55</sup> For Coleman, such measures were fundamentally a matter of advancing *educational equality* between students of different races. After decades of examining the causes and consequences of the racial separation that continued to plague American schools, he saw parental choice as a means of promoting an equality of educational opportunity.<sup>56</sup>

##### 5. Chubb and Moe Examine the Political Realities

By the 1980s, the concept of publicly funded private school parental choice had been examined by academics from just about every point on the ideological spectrum, but the issue was still widely considered to be impracticable as a political matter.<sup>57</sup> As the decade drew to a close, Terry Moe and John Chubb helped reframe much of the research that had been done to date and added a new perspective on the political realities that had for so long kept parental choice confined to the academy.<sup>58</sup> In a 1990 book titled *Politics, Markets, and American Schools* and a preceding article, Chubb and Moe incorporated much of the work that Friedman, Coleman, and others had done into a new argument about the fundamental differences between public and private education.<sup>59</sup> Chubb and Moe focused on the different

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52. VITERITTI, *supra* note 39, at 80; *see also* JAMES S. COLEMAN ET. AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* (1982).

53. VITERITTI, *supra* note 39, at 81; Viteritti, *supra* note 10, at 269.

54. VITERITTI, *supra* note 39, at 81; *see* ANTHONY BRYK ET. AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* (1993).

55. Viteritti, *supra* note 10, at 269.

56. *Id.*

57. TERRY M. MOE, *SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS* 327–28 (2011).

58. *See* CHUBB & MOE, *supra* note 23.

59. *Id.*; *see also* John E. Chubb & Terry M. Moe, *Politics, Markets, and the Organization of Schools*, 82 AM. POL. SCI. REV. 1065 (1988).

means by which public and private schools were incentivized to change—commonly referred to as the difference between “voice” in the public sector and “exit” in the private sector—as a means of examining whether such differences influenced the achievement results that Coleman and others had previously identified.<sup>60</sup> Their work was a return to the market model that Friedman had advanced nearly a half-century earlier, incorporating both an empirical and a philosophical rationale for Friedman’s proposition that nonpublic schools would indeed outperform public schools if they were freed of excessive government regulations.<sup>61</sup>

In many ways, what really made Chubb and Moe’s work so influential in bringing choice beyond the academy and into the legislative realm was the rigor with which they examined the political structures that made systemic reforms in education so difficult to advance.<sup>62</sup> In examining key questions about how education policy was developed at the state and federal level and how organized interests could successfully use bureaucracy and the politics of blocking to maintain the status quo, they made a compelling argument that the only means of effecting systemic reform would be through the application of an outside force such as the market—in other words, a widespread expansion of educational options.<sup>63</sup> As Chubb and Moe explained, there were two fundamental reasons why the institutional and infrastructural issues that held American education back had been consistently ignored—the first was a matter of politics, and the second was a matter of social science.<sup>64</sup> With regard to the political dimension, they struck right at the heart of the matter, stating:

When it comes to educational decisionmaking, particularly at the state and local levels where effective authority resides, the most powerful political groups by far are those with vested interests in the current institutional system: teachers unions and myriad associations of principals, school boards, superintendents, administrators, and professionals—not to mention education schools, book publishers, testing services, and many other beneficiaries of the status quo.<sup>65</sup>

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60. Chubb & Moe, *supra* note 59, at 1067–68.

61. Viteritti, *supra* note 10, at 271.

62. *Id.*

63. *Id.* See CHUBB & MOE, *supra* note 23, at 185–230.

64. CHUBB & MOE, *supra* note 23, at 11, 13.

65. *Id.* at 11–12.

In examining what role the academy had played in shaping the education reform debate, they were even sharper, arguing that social scientists had largely ignored questions of institutional control in the education sector, despite the fact that these questions were at the very heart of what made some schools better than others.<sup>66</sup>

Chubb and Moe focused on understanding the *units of control* in the educational system—both those elements that were the arbiters of change within public and private schools and the political structures that controlled the degree to which the educational system itself could be reformed. These arguments represented a provocative new approach to education policy—especially in light of the stark realities outlined in a report issued by the National Commission on Excellence in Education several years earlier<sup>67</sup>—and they put parental choice firmly at the center of a growing national debate about what the units of change in education should be.<sup>68</sup> In many ways, this was precisely the case that needed to be made in order to move from rhetoric and research to political reality. Within two years of the release of *Politics, Markets, and America's Schools*, both charter schools and vouchers had become a reality.<sup>69</sup>

## B. *From the Academy to the Statehouse*

### 1. The Crisis Becomes the Opportunity

“Misery,” Shakespeare noted, “acquaints a man with strange bedfellows.”<sup>70</sup> Such was the case in the education sector in urban Milwaukee in 1990.<sup>71</sup> For almost fifteen years, the city had been engaged in a comprehensive reform campaign to promote racial balance and close the achievement gap that involved interventions such as interdistrict busing and magnet schools.<sup>72</sup> The results of these efforts were underwhelming to parents and

66. *Id.* at 13–14.

67. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

68. VITERITTI, *supra* note 39, at 87. As Viteritti noted, “[s]o far as education was concerned, this would prove to be the most important book of the decade.” *Id.*

69. Robert C. Bulman & David L. Kirp, *The Shifting Politics of Choice, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND THE LAW* 36, 47, 52–53 (Stephen D. Sugarman & Frank R. Kemerer eds., 2000); Viteritti, *supra* note 10, at 272.

70. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 2 (Chauncey Brewster Tinker ed., 1918).

71. CLINT BOLICK, *VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE* 15 (2003).

72. VITERITTI, *supra* note 39, at 98–99.

policymakers alike, with one black activist referring to the experience as “a bus ride to nowhere.”<sup>73</sup> It was this torpor that motivated Polly Williams, a single mother who had become disenchanted with the existing political order’s ability to effect systemic change in the city’s schools, to run for a seat in the Wisconsin State Assembly and begin a fight to expand educational options for at-risk Milwaukee children such as her own.<sup>74</sup> In time, Williams would join forces with a remarkably eclectic cast of characters, including Milwaukee’s Democratic Mayor John Norquist and Wisconsin’s Republican Governor Tommy Thompson on a plan to enact a program that would allow Milwaukee children to use publicly funded vouchers to attend private schools.<sup>75</sup> As Williams explained it, “I came up with choice outside the public school system because I couldn’t get choice inside it.”<sup>76</sup>

So it was that the MPCP, the nation’s first publicly funded private school parental choice program, was enacted in 1990.<sup>77</sup> The program was quite small at the start—and restricted to private secular schools—with fewer than 400 students enrolling in seven schools in the inaugural cohort.<sup>78</sup> But in the face of fierce opposition, Polly Williams and her allies had taken the first small steps in what has become a multi-generational march to expand educational options.<sup>79</sup>

In 1995, the MPCP was expanded to include religious schools, a move that prompted three years of contentious litigation, but which ultimately led to an increase in the program’s enrollment.<sup>80</sup> That same year, Ohio became the second state to enact choice legislation, as Governor George Voinovich, the former mayor of Cleveland and an acclaimed education reform advocate, signed the Cleveland Scholarship and Tutoring Program into law.<sup>81</sup> Two years later, Arizona became the first state to use tax policy to crack the parental choice nut, with the pas-

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73. *Id.* at 99.

74. *Id.*

75. VITERITTI, *supra* note 39, at 100.

76. *Id.*

77. WIS. STAT. § 119.23 (2004 & West Supp. 2011).

78. BRIAN KISIDA ET AL., THE MILWAUKEE PARENTAL CHOICE PROGRAM: DESCRIPTIVE REPORT ON PARTICIPATING SCHOOLS 2009–2010, at 2–3 (2011), available at [http://heartland.org/sites/all/modules/custom/heartland\\_migration/files/pdfs/29803.pdf](http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/29803.pdf).

79. SOL STERN, BREAKING FREE: PUBLIC SCHOOL LESSONS AND THE IMPERATIVE OF SCHOOL CHOICE 194 (2003).

80. VITERITTI, *supra* note 39, at 102–03; KISIDA ET AL., *supra* note 78, at 3.

81. VITERITTI, *supra* note 39, at 109; *see also* SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 57; OHIO REV. CODE ANN. §§ 3313.974–3313.979 (LexisNexis 2009 & Supp. 2012).



sage of its Individual School Tuition Organization Credit.<sup>82</sup> By the end of the decade, Florida had brought the total number of states with parental choice programs to four with the creation of the John M. McKay Scholarship for Students With Special Needs Program.<sup>83</sup>

## 2. In the Wake of *Zelman*

By 2000, nearly a half-century after the release of Milton Freidman's seminal article on educational vouchers, the parental choice movement had advanced from a theoretical abstraction to a policy reality, with four operational programs together enrolling thousands of children.<sup>84</sup> A question remained whether the policy would ever be more than a marginal experiment, as some suspected that parents were reluctant to enroll their children in programs that stood on questionable legal grounds (and, it can be assumed, many states were reluctant to enact choice legislation for much the same reason).<sup>85</sup> The question—which cut to the very heart of the same church-state and parental rights issues that had animated Archbishop Hughes and his allies more than 150 years earlier—was whether religiously neutral state aid that allowed parents to select religious schools for their children represented a violation of federal and state prohibitions on the establishment of religion.

In 2002, the parental choice movement got its answer (at least in part), in the form of the landmark *Zelman* decision.<sup>86</sup> In *Zelman*, a 5-4 Supreme Court determined that the Cleveland voucher program did not violate the First Amendment's Establishment Clause, nor would any well-designed parental choice program that met a set of criteria that has come to be known as the "private choice test."<sup>87</sup>

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82. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 42; ARIZ. REV. STAT. ANN. § 43-1183 (2012) (West).

83. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 47; FLA. STAT. ANN. §§ 1002.39, 1002.421 (West 2012).

84. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 27.

85. Viteritti, *supra* note 10, at 275.

86. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

87. *Id.* Clint Bolick, *Voucher Law*, in HANDBOOK OF RESEARCH ON SCHOOL CHOICE 281, 283 (Mark Berends et al. eds., 2009). The factors of the private choice test, which is a derivative of the *Lemon* test, are commonly understood as: (1) the program must have a valid secular purpose, (2) aid must be granted to students, and not to the participating schools, (3) a broad class of beneficiaries must be covered, (4) the program must be neutral with respect to religion, and (5) there must be adequate nonreligious options. See *Zelman*, 536 U.S. at 652–54.

With *Zelman* decided, much of the legal uncertainty that had plagued choice advocates was lifted, as the question of parental choice's constitutionality under the First Amendment was finally and favorably settled for the proponents.<sup>88</sup> Another (often more difficult) challenge lay (and continues to lie) ahead in many states, where state religion clauses—the “Blaine Amendments” discussed above—are still frequently misinterpreted to prohibit state aid in support of the intervening private choice of prospective parents.<sup>89</sup>

Nonetheless, the *Zelman* decision represented an inflection point in the growth of the parental choice movement. By 2007–2008, just five years after *Zelman*, eight new parental choice programs had been added (including the nation's first and only federally funded choice program, the Washington D.C. Opportunity Scholarship Program) bringing the total number of programs to fourteen, and enrollment in such programs had grown by more than 285%, from approximately 55,373 to approximately 158,725.<sup>90</sup> From 2007–2011, the growth rate was even more precipitous. By 2011–2012, the number of programs had nearly tripled from the 2007 count—with more than twenty-five programs in thirteen states and the District of Columbia enrolling more than 210,000 children.<sup>91</sup>

### C. *The Varying Forms of Parental Choice*

Over the course of the past twenty-three years, education reformers have developed a range of policy instruments designed to provide public support for private school scholarships. With

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88. Bolick, *supra* note 87, at 282–83; see, e.g., Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 15–18 (2002).

89. Komer, *supra* note 34, at 332.

90. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 27. Enrollment numbers of this type are estimates provided by the Alliance for School Choice. Since the publication of the Alliance for School Choice report, New Hampshire has enacted a scholarship tax credit program, Mississippi has enacted a special needs opportunity scholarship program, and North Carolina has enacted an individual tax tuition credit program. See SCHOOL CHOICE YEARBOOK 2012–2013, *supra* note 13, at 16.

91. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 27. Particularly noteworthy during this period was the passage of the Indiana Choice Scholarship Program, a statewide means-tested voucher enacted in 2011 and the Louisiana Student Scholarships for Educational Excellence Program, a failing school/means-tested voucher enacted in 2008 and expanded statewide in 2012. See *id.* at 37; SCHOOL CHOICE YEARBOOK 2012–2013, *supra* note 13, at 20. As is discussed herein, both of these programs have tremendous potential to serve as models for future choice programs, insofar as they use fairly broad student eligibility requirements and have fairly large average scholarship amounts.

more than thirty choice programs currently operating, no two are exactly alike—and none are as expansive as the “universalist” model imagined by Milton Friedman. However, these programs can be broadly classified into three types: opportunity scholarship programs (often referred to as “vouchers”), scholarship tax credits, and education savings accounts.<sup>92</sup> The primary difference among these forms essentially boils down to how the money flows from the taxpayer to the schools.<sup>93</sup>

### 1. Opportunity Scholarships

In opportunity scholarship programs, the public funding “follows the child” to the school of the family’s choice.<sup>94</sup> The amount of the funding varies, although it is typically some portion of the funding allocated toward educating the child in the traditional public school system.<sup>95</sup> There are presently three different forms of opportunity scholarship programs operating across the country: *means tested scholarships*, *failing schools scholarships*, and *special needs scholarships*.<sup>96</sup> Means tested programs restrict eligibility based on family income, failing schools programs restrict eligibility based on the performance of public schools or school districts to which interested families are assigned, and special needs scholarships restrict eligibility based on the educational needs of interested children (such programs typically require students to have a completed Individualized Education Plan (IEP) in order to qualify).<sup>97</sup> During the 2011–2012 school year, there were fourteen opportunity scholarship programs—five of which (Indiana’s Choice Scholarship Program, Wisconsin’s Milwaukee Parental Choice Program and Parental Private School Choice Program, Washington D.C.’s Opportunity Scholarship Program, and Ohio’s Cleveland Scholarship and Tutoring Program) are means tested, one of which (Ohio’s EdChoice Scholarship Program) is a failing schools model, seven of which (Florida’s John M. McKay Scholarship for Students with Disabilities Program, Georgia’s Special Needs Scholarship Program, Louisiana’s School Choice Pilot Program

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92. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 9–10. I have chosen to not include public charter schools in this categorization, as they are outside the scope of this inquiry.

93. DAVID STUIT & SY DOAN, THOMAS B. FORDHAM INST., SCHOOL CHOICE REGULATIONS: RED TAPE OR RED HERRING? 11 (2013), *available at* <http://www.edexcellence.net/publications/red-tape-or-red-herring.html>.

94. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 9.

95. STUIT & DOAN, *supra* note 93, at 11.

96. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 9.

97. *Id.*

for Certain Students with Exceptionalities, Oklahoma's Lindsey Nicole Henry Scholarship for Students with Disabilities Program, Ohio's Jon Peterson Special Needs Scholarship Program and Autism Scholarship Program, and Utah's Carson Smith Special Needs Scholarship) are special needs models, and one of which (Louisiana's Student Scholarship for Educational Excellence Program) is a hybrid means tested/failing schools model.<sup>98</sup>

## 2. Scholarship Tax Credits

In scholarship tax credit programs, the state permits individuals and/or corporations to donate to qualified scholarship organizations in exchange for credits against their state tax liability.<sup>99</sup> These scholarship organizations, which go by different names across the states (Scholarship Granting Organizations (SGOs) in Arizona, Indiana, Oklahoma, and Rhode Island; School Tuition Organizations (STOs) in Florida and Iowa; Student Scholarship Organizations (SSOs) in Georgia; and Scholarship Organizations (SOs) in Pennsylvania), partner with private schools and use the contributed funds to provide scholarships for eligible students.<sup>100</sup>

In contrast to opportunity scholarship programs, in which taxpayer money is allocated directly from the state to private schools (in the name of the participating child), the state never actually "touches" taxpayer funds in scholarship tax credit programs.<sup>101</sup> This dynamic most likely mitigates, and perhaps even abrogates, the typically misguided religion clause constitutional concerns that some may raise in objection to opportunity scholarship programs, and it most likely makes parental choice more politically palatable to policy makers who may be reluctant to get mired in the now toxic debate over "vouchers." Likewise, insofar as the scholarship organizations—not the state—serve as the fiduciary of the state money in these systems, scholarship tax credit programs tend to impose less regulatory burden on participating schools and families.<sup>102</sup>

## 3. Education Savings Accounts

Education Savings Accounts (ESAs) are the newest policy instruments in the parental choice portfolio.<sup>103</sup> First enacted in

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98. STUIT & DOAN, *supra* note 93, at 10.

99. *Id.* at 11.

100. See SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 42–43, 48, 50–51, 53, 62–64.

101. STUIT & DOAN, *supra* note 93, at 10.

102. *Id.*

103. See SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 45; MATTHEW LADNER, FRIEDMAN FOUND. FOR EDUC. CHOICE, THE WAY OF THE FUTURE:

Arizona in 2011 and then expanded in 2012 as a failing schools model,<sup>104</sup> ESAs allow parents to “withdraw their children from public district or charter schools and receive a deposit of public funds into government authorized savings accounts with restricted, but multiple, uses.”<sup>105</sup> These funds can be used for private school tuition, textbooks, tutoring, testing fees, online learning, and a number of other purposes, including higher education expenses such as community college costs.<sup>106</sup> To date, Arizona is the only state to enact an ESA initiative.<sup>107</sup> The program has survived one round of legal challenge, but litigation continues to move through the appellate ladder.<sup>108</sup>

## II. CATHOLIC SCHOOL PARTICIPATION IN PARENTAL CHOICE PROGRAMS

### A. *Of Closed Schools and Empty Seats: K–12 Catholic Schools Today*

The story of the American Catholic school system is, in many ways, one of extraordinary and inspiring growth, followed by an equally extraordinary and tragic decline. In 1880, Catholic school enrollment nationwide was approximately 405,000.<sup>109</sup> By 1930, enrollment had more than quadrupled to nearly 2.5 mil-

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EDUCATION SAVINGS ACCOUNTS FOR EVERY AMERICAN FAMILY 1, 8 (2012), *available at* <http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/925/The-Way-of-the-Future—Education-Savings-Accounts-for-Every-American-Family.pdf>.

104. See ARIZ. REV. STAT. ANN. §15-2401 (2012) (West).

105. LADNER, *supra* note 103, at 1.

106. *Id.* at 8. Matt Ladner posits that some of the intellectual origins of ESAs can actually be found in the 2009 *Cain v. Horne* oral argument and decision. In *Cain*, the Arizona Supreme Court ruled that two special needs voucher programs enacted in 2006 violated the state’s Blaine Amendment. During oral argument, Chief Justice Hurwitz engaged in a line of questioning regarding whether it would be permissible to allow public funds to be directed towards parents to choose from a broad range of educational options. *Id.* at 14–16. In the opinion, the Arizona Supreme Court noted that while the two programs in question did not comply with the requirements of the state’s religion clauses, “[t]here may well be ways of providing aid to these student populations without violating the constitution.” *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009).

107. SCHOOL CHOICE YEARBOOK 2011–2012, *supra* note 12, at 12–13.

108. FRIEDMAN FOUND. FOR EDUC. CHOICE, THE ABCs OF SCHOOL CHOICE 89 (2013), *available at* <http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/965/The-ABCs-of-School-Choice—2013-edition.pdf>. The challenge to the ESA program in Arizona is currently pending before the Arizona Court of Appeals. *SB 1363: Empowerment Scholarship Accounts; Expansion; Funding*, CTR. FOR ARIZ. POLICY, <http://www.azpolicy.org/bill-tracker/sb-1363-empowerment-scholarship-accounts-expansion-funding> (last visited Apr. 20, 2013).

109. Jessica A. Greene & Joseph M. O’Keefe, *Enrollment in Catholic Schools in the United States*, in HANDBOOK OF RESEARCH ON CATHOLIC EDUCATION 161, 162 (Thomas C. Hunt et al. eds., 2001).

lion.<sup>110</sup> It took less than thirty years for enrollment to double to more than 5.5 million in 1964–65.<sup>111</sup> Since then, the story has been much different. Enrollment has dropped steadily (with the exception of the 1990s, which saw a slight uptick) to the current total of just over two million.<sup>112</sup> In just the last two decades, more than 1600 Catholic schools have closed,<sup>113</sup> and enrollment has dropped by approximately 600,000.<sup>114</sup> The causes of this decline have been examined extensively,<sup>115</sup> as have the potential consequences for the K–12 education sector and for our civil society.<sup>116</sup>

## 1. The Empty Seats Question

As enrollment has declined in recent years, at least two predictable but nonetheless notable things have happened on the “supply side” in the Catholic school landscape. The first, as noted above, is the closure of Catholic school facilities. The second is the dramatic increase in the marginal capacity—or number of “empty seats”—in Catholic schools. With this in mind, a team here at the University of Notre Dame recently set out to establish a reliable estimate for Catholic school empty seats nationwide. Our lead researcher, Juan Carlos Guzman, considered several approaches, and ultimately developed a method that yields an estimate that is conservative, but reliable.

Using data from the Private School Survey (PSS), we estimate that there are approximately 460,000 empty seats in Catholic schools nationwide. This estimate was derived using PSS data from 1997 to 2010. From within that timeframe Guzman identified the year with the highest enrollment and compared it to 2010 to come up with an estimated number of empty seats. Because not every private school completes the NCES survey (which is done every two years), a weight was established to more

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110. *Id.*

111. *Id.*

112. McDONALD & SCHULTZ, *supra* note 19, at 11.

113. Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887, 889 (2010).

114. McDONALD, *supra* note 19, at 2.

115. *See, e.g.*, Brinig & Garnett, *supra* note 113, at 896–902.

116. *See, e.g.*, WHITE HOUSE DOMESTIC POLICY COUNCIL, PRESERVING A CRITICAL NATIONAL ASSET: AMERICA’S DISADVANTAGED STUDENTS AND THE CRISIS IN FAITH-BASED URBAN SCHOOLS (2008), *available at* <http://www2.ed.gov/admins/comm/choice/faithbased/report.pdf>; THOMAS B. FORDHAM INST., WHO WILL SAVE AMERICA’S CATHOLIC SCHOOLS (Scott W. Hamilton ed., 2008), *available at* [http://www.edexcellencemedia.net/publications/2008/200804\\_whoillsaveamericasurban/catholic\\_schools\\_08.pdf](http://www.edexcellencemedia.net/publications/2008/200804_whoillsaveamericasurban/catholic_schools_08.pdf).

accurately estimate the number of empty seats. Figure 1 shows a state-by-state breakdown of the results.

FIGURE 1. ESTIMATED EMPTY SEATS IN CATHOLIC SCHOOLS NATIONWIDE

| State                | Empty Seats | Enrollment<br>(NCEA) <sup>117</sup> | Schools<br>(NCEA) <sup>118</sup> |
|----------------------|-------------|-------------------------------------|----------------------------------|
| Alabama              | 2,974       | 12,517                              | 51                               |
| Alaska               | 127         | 1,027                               | 11                               |
| Arizona              | 2,829       | 20,533                              | 61                               |
| Arkansas             | 1,148       | 7,122                               | 33                               |
| California           | 40,915      | 214,139                             | 666                              |
| Colorado             | 3,219       | 15,773                              | 56                               |
| Connecticut          | 8,267       | 31,875                              | 122                              |
| Delaware             | 1,824       | 11,979                              | 36                               |
| District of Columbia | 281         | 27,928                              | 97                               |
| Florida              | 15,837      | 82,028                              | 219                              |
| Georgia              | 1,980       | 17,063                              | 46                               |
| Hawaii               | 1,615       | 9,797                               | 40                               |
| Idaho                | 604         | 2,791                               | 14                               |
| Illinois             | 42,080      | 151,815                             | 487                              |
| Indiana              | 11,182      | 55,397                              | 186                              |
| Iowa                 | 7,037       | 29,318                              | 113                              |
| Kansas               | 4,521       | 29,373                              | 107                              |
| Kentucky             | 7,241       | 37,917                              | 120                              |
| Louisiana            | 12,820      | 80,566                              | 219                              |
| Maine                | 1,078       | 3,178                               | 14                               |
| Maryland             | 10,612      | 27,962                              | 70                               |
| Massachusetts        | 11,893      | 61,885                              | 198                              |
| Michigan             | 19,670      | 58,693                              | 237                              |
| Minnesota            | 12,254      | 47,604                              | 198                              |
| Mississippi          | 1,813       | 8,821                               | 34                               |
| Missouri             | 12,941      | 66,605                              | 255                              |
| Montana              | 711         | 3,606                               | 22                               |
| Nebraska             | 5,413       | 28,778                              | 117                              |
| Nevada               | 550         | 5,695                               | 14                               |
| New Hampshire        | 2,752       | 6,863                               | 29                               |

117. McDONALD, *supra* note 19, at 41.

118. *Id.*

|                       |         |           |       |
|-----------------------|---------|-----------|-------|
| <b>New Jersey</b>     | 23,099  | 91,737    | 281   |
| <b>New Mexico</b>     | 1,794   | 6,345     | 31    |
| <b>New York</b>       | 52,552  | 192,478   | 595   |
| <b>North Carolina</b> | 2,331   | 16,589    | 50    |
| <b>North Dakota</b>   | 903     | 4,354     | 26    |
| <b>Ohio</b>           | 32,255  | 137,320   | 418   |
| <b>Oklahoma</b>       | 1,327   | 9,670     | 35    |
| <b>Oregon</b>         | 1,889   | 14,890    | 55    |
| <b>Pennsylvania</b>   | 46,070  | 144,912   | 515   |
| <b>Rhode Island</b>   | 3,119   | 13,840    | 44    |
| <b>South Carolina</b> | 1,838   | 7,117     | 32    |
| <b>South Dakota</b>   | 1,605   | 5,816     | 23    |
| <b>Tennessee</b>      | 1,416   | 18,042    | 61    |
| <b>Texas</b>          | 13,713  | 78,534    | 277   |
| <b>Utah</b>           | 1,713   | 5,693     | 20    |
| <b>Vermont</b>        | 884     | 2,163     | 13    |
| <b>Virginia</b>       | 4,774   | 26,809    | 78    |
| <b>Washington</b>     | 3,365   | 28,922    | 97    |
| <b>West Virginia</b>  | 1,452   | 5,935     | 29    |
| <b>Wisconsin</b>      | 16,957  | 60,273    | 304   |
| <b>Wyoming</b>        | 393     | 928       | 9     |
|                       |         |           |       |
| <b>Total</b>          | 459,637 | 2,031,455 | 6,841 |

2. Catholic School Empty Seats and Parental Choice

Given how deeply rooted issues of parental authority are in Catholic social thought, and in light of how beneficial public tuition support in the form of opportunity scholarships, scholarship tax credits, or education savings accounts could be to Catholic schools, one might suspect that the growth of the parental choice movement has represented a dramatic decline in the “empty seats” population in Catholic schools nationally. However, this is not unequivocally the case. There are parental choice programs of the kind examined herein presently operating in sixteen states and the District of Columbia. Those states/districts are: Arizona, Florida, Georgia, Indiana, Iowa, Louisiana, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Virginia, Wisconsin, and Washington D.C. Our analysis reveals that more than 165,000 (thirty-six percent) of the empty seats nationwide are in these sixteen states. Perhaps more interesting, four of the ten states with the greatest marginal capacity (New York: 52,552, Pennsylvania: 46,070, Illinois: 42,080,



California: 40,915, Ohio: 32,255, New Jersey: 23,099, Michigan: 19,670, Wisconsin: 16,957, and Florida: 15,837) have had parental choice programs for more than a decade. These data would seem to suggest that Catholic schools could, at least to some degree, take better advantage of the opportunity that these parental choice programs now offer.

B. *Regulation and Recruiting: Barriers and Opportunities for Catholic School Participation in Parental Choice Programs*

In an effort to develop a rough estimate of the total number of Catholic school students nationwide receiving some form of publicly funded tuition support, we contacted various state departments of education, scholarship organizations, and (arch)diocesan offices to collect this information. Because this data is not aggregated in a uniform fashion across the states (in fact, some states appear to not collect it at all), we had to fashion our approach on a state-by-state basis. We ultimately collected reliable data from several states, including Iowa (where 75% of the students participating in the choice program are enrolled in a Catholic school), Indiana (where 64% of the students participating in the choice programs are enrolled in a Catholic school), Ohio (where 63% of the students participating in the choice programs are enrolled in a Catholic school), Wisconsin (where 34% of the students participating in the choice program are enrolled in a Catholic school), and Florida (where 13% of the students participating in the scholarship tax credit program are enrolled in a Catholic school).

I believe that there are both policy/regulatory and operational issues that have limited the degree to which Catholic schools have taken advantage of parental choice opportunities. The sections below examine these two dimensions.

1. Policy/Regulatory Issues

In a recent study released by the Fordham Institute David Stuit and Sy Doan provided an outstanding analysis of the degree to which the regulatory regimes of various choice programs motivate or deter private school participation.<sup>119</sup> They found that while there is great variation in regulatory structure among the various choice programs, there is nonetheless a “moderately negative correlation between regulatory burden and private school participation.”<sup>120</sup> However, regulatory burdens did not appear to be the greatest deterrent to private school participation in choice

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119. STUIT & DOAN, *supra* note 93.

120. *Id.* at 4.

program.<sup>121</sup> Instead, schools appear more concerned about the design of the program itself: e.g., scholarship amount, student eligibility, application procedures, etc.<sup>122</sup>

It is important to note that these data deal with questions of a private school's willingness to participate in a choice program at all, not the degree to which the school takes advantage of the choice program(s). In general, Catholic schools are the least likely of all private school operators to have their decision to participate in a choice program determined by the regulatory regime.<sup>123</sup> For example, the Indiana Department of Education recently shared data that indicated that 168 of the 175 (96%) Catholic schools in the state participated to some degree in the Choice Scholarship Program during the 2012–2013 school year.<sup>124</sup>

In general, I suspect that there are three policy/regulatory issues in the design of choice programs that are likely to have the greatest effect on Catholic school participation: *student eligibility* (i.e., the broader the class of students eligible and the clearer the eligibility standards, the greater the demand), *scholarship size* (i.e., the higher the average scholarship, the greater the demand), and *ease of application procedures*. For scholarship tax credit programs, I would add a fourth dimension: *level of the state credit on donations to the scholarship fund* (i.e., the closer the credit is to 100% of the amount contributed, the greater the size of the overall pot from which the scholarship organization(s) can draw).

## 2. Operational Issues

In addition to these questions of policy design, there are several implementation issues that can have an effect on the Catholic school participation in a choice program. While it is beyond the scope of this Article to provide an exhaustive review of the practices and procedures that have proven to be most successful in areas such as student recruitment and retention, there is one issue that deserves particular attention.

A 2009 study published by the University of Notre Dame indicated that although more than 65% of all practicing

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121. *Id.* at 5.

122. *Id.* at 5, 7.

123. *Id.* at 5.

124. Ind. Dep't of Educ., Spreadsheet of Indiana Catholic School Participation in Choice Scholarship Program (Jan. 31, 2013) (unpublished data) (on file with author).

Catholics in the United States are Latino,<sup>125</sup> only 3% of Latino families attend Catholic schools.<sup>126</sup> This reality, coupled with data that indicates that Latino children are 42% more likely to graduate from high school and two and a half times more likely to graduate college if they attend a Catholic K–12 school represents what might be called a “demographic imperative” for the American Catholic Church and its schools.<sup>127</sup>

Using National Catholic Educational Association (NCEA) enrollment data and 2010 census data, we conducted a rough analysis of Latino enrollment in Catholic schools in several choice jurisdictions in relation to the estimated population of school age Latino children in those areas. Figure 2 represents a sample of these findings:

FIGURE 2: LATINO ENROLLMENT IN CATHOLIC SCHOOLS

| (Arch) Diocese | Catholic Schools | Enrollment 2011–2012 (NCEA) <sup>128</sup> | Latino Enrollment 2011–2012 <sup>129</sup> | %Latino Enrollment | Latino Population <18 (2010 Census) <sup>130</sup> | % Enrolled in Catholic Schools |
|----------------|------------------|--|--|--------------------|--|--------------------------------|
| Indianapolis   | 71               | 22,558                                     | 1,023                                      | 4.5%               | 49,406   | 2.1%                           |
| Cleveland      | 125              | 46,903                                     | 1,522                                      | 3.2%               | 40,948   | 3.7%                           |
| Miami          | 66               | 33,906                                     | 22,134                                     | 65.3%              | 443,724  | 5.0%                           |
| Philadelphia   | 219              | 76,894                                     | 3,248                                      | 4.2%               | 101,633  | 3.2%                           |

These figures seem to indicate that there are substantial numbers of prospective Catholic school students in many parental choice jurisdictions, and that reality, coupled with the fact that many of these areas have substantial marginal capacity, could represent an outstanding incentive for Catholic schools to

125. David Campbell & Robert Putnam, *The Changing Face of American Catholicism*, 2008 (unpublished memo prepared for the United States Conference of Catholic Bishops) (on file with author).

126. THE NOTRE DAME TASK FORCE ON THE PARTICIPATION OF LATINO CHILDREN & FAMILIES IN CATHOLIC SCH., *TO NURTURE THE SOUL OF A NATION: LATINO FAMILIES, CATHOLIC SCHOOLS, AND EDUCATIONAL OPPORTUNITY* 10–11 (2009), available at [http://ace.nd.edu/files/ACE-CSA/nd\\_ltf\\_report\\_final\\_english\\_12.2.pdf](http://ace.nd.edu/files/ACE-CSA/nd_ltf_report_final_english_12.2.pdf).

127. *Id.* at 8–9.

128. McDONALD, *supra* note 19, at 37.

129. These data were gathered by interviewing personnel at each diocese and asking them to self-report Latino enrollment for the 2011–2012 school year.

130. *Census 2010 & GeoDemographic Analysis: Analyzing Hispanic Population Patterns*, PROXIMITY, [http://proximityone.com/hispanic\\_demographics.htm](http://proximityone.com/hispanic_demographics.htm) (last visited Apr. 20, 2013).

participate as assiduously as possible in parental choice programs.

### III. CONCLUSION

For more than 150 years, academics and policy makers have debated the constitutionality and merits of public support for parental choice in education. For the past twenty-four years, we have been able to examine these questions in real time, as a growing body of evidence develops with the passage of each new parental choice program. This Article surfaces two different, perhaps more basic questions about the valence between parental choice policies and K–12 Catholic schools: (1) what does Catholic education mean to the parental choice movement, and (2) what does the parental choice movement mean to Catholic schools?

It appears that parental choice policy is on a growth trajectory, and there are some estimates that indicate that there are already more than one million private school seats legislated across the country. With at least 460,000 empty Catholic school seats nationwide, what can the Catholic Church do to ensure that parental choice policy is used effectively to empower families interested in a Catholic education? As Professors Brinig and Garnett note, “[t]hese schools are an endangered species. Unless steps are taken to save them, they will be lost forever to their students and their neighborhoods.”<sup>131</sup> It would seem that the parental choice programs of today represent at least a small glimpse of the promise that Archbishop Hughes sought to fulfill, and about which Pope Benedict XVI so eloquently spoke. The question is: how can the Church most prudently take advantage of this opportunity?

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131. Brinig & Garnett, *supra* note 113, at 953.

